IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.763 OF 2003

Nitin Pundalik Patil
Age 21 years, residing
at Kajuwadi, Wagle Estate
Thane. ...Appellant.

V/s

The State of Maharashtra
(at the instance of Wagle
Estate Police Station,
Thane) ...Respondent.

Mr. Ayaz Khan with Ganesh Gole for the applicant.

Mr. A.M. Shringarpure, APP for the State.

CORAM: V.M.KANADE,J.

DATE: 26th October, 2004.

ORAL JUDGMENT:

1. Appellant is challenging the judgment and Order passed by the Special Judge, Thane in Special Sessions Case No.408 of 2002. By the said Judgment and Order, the Trial Court convicted the accused for having committed an offence punishable under section 20(ii)(c) of the N.D.P.S. Act and sentenced him to suffer R.I. for 10 years and to pay fine of Rs 1 lakh and, in default, to suffer R.I. for one year.

2. Prosecution case is that Shri Jadhav, API had received an information on 30/8/2002 at about 1.20 P.M. that the accused was likely to bring Charas for

sale near Shrimate Beer Bar and Restaurant and that he is likely to arrive at 2.00 P.M. The information was reduced in writing by Shri Jadhav and necessary entries were made in the Station Diary. A report was submitted by Shri Jadhav to his immediate superior Shri Tambat. A direction was given to collect the material which is required for ceiling the contraband as also weight, scale and other relevant papers. The raiding party went to the place where the accused was supposed to arrive. The accused was intercepted at 2.50 P.M. Necessary formalities were complied with. Search was taken after the accused was appraised of his right. Charas was found in the hand-bag which was carried by the accused. The total weight was 1 Kg 900 grams which was accordingly sealed under Panchanama. Samples were sent to the Chemical Analyser who gave the opinion that the sample contained Charas. The charge was framed. The accused pleaded not guilty. The accused denied the said charge. The Trial Court on the basis of the evidence adduced by the prosecution convicted the accused.

3. The learned Counsel appearing on behalf of the appellant submitted that out of 7 witnesses which were examined by the prosecution, panch witnesses have turned hostile and remaining five witnesses were

police witnesses. He submitted that independent witnesses were not examined by the prosecution and, therefore, it is not safe to rely upon the evidence of police witnesses and the appellant was entitled to be given a benefit of doubt.

4. It is further submitted that the prosecution had not complied with the provisions of sections 41 and 42 of the N.D.P.S. Act. It is further submitted that there was non-compliance of section 50 of the N.D.P.S. Act. In support of the said submission, he relied upon the judgment of the Apex Court in the case of **Bahadur Singh Vs. State of Madhya Pradesh and another,** reported in **2002 CRI.L.J. 579** wherein the Apex Court observed that if there are serious discrepancies in respect of recovery, seizure and deposit in the Maalkhana, the accused cannot be convicted under the provisions of the N.D.P.S. Act. He also relied upon the Judgment of the Apex Court in the case of **Jagdish Vs. State of Madhya Pradesh** reported in **AIR 2002 SC 2540** wherein the Apex Court held that in a case where the panchas did not support the prosecution case regarding the discovery of contraband, the conviction cannot be based on the sole testimony of the Sub-Inspector. He further relied upon the Division Bench Judgment of this Court in the

case of **Shri Murata Chiharu Vs. State of Goa** reported in **1998 ALL MR (Cri) 889** wherein this Court has held that non-compliance of provisions of section 50 would result in setting aside the conviction and sentence. He further relied upon the Division Bench Judgment of this Court dated 7/9/2004 in the case of The State of Maharashtra Vs. Sajutali Mahibub ali Bavna Sarjuri in Criminal Appeal No.354 of 1994 wherein this Court has taken a view that non-compliance of sections 52, 55 and 57 created a doubt whether the sample was, in fact, sent to the Chemical Analyser and that non-compliance of these provisions would have bearing on the appreciation of evidence regarding arrest of the accused or seizure of the articles. He further relied upon the judgment of the Apex Court in the case of **Gurbax Singh Vs. State of Haryana** reported in **2001 CRI L.J. 1166** on the consequences of failure to comply with the provisions of section 57. He further relied on the other judgments of the Apex Court on the same point.

5. Prosecution has examined Suhas Surve as P.W.1. This witness is examined as panch who had signed the panchanama. This witness, however, has turned hostile. This witness was sought to be examined to prove the search and seizure of the contraband. P.W.

2 - Ravishankar Brigraj Singh was also examined as panch who had signed the panchanama regarding seizure. However, he also turned hostile. Both the independent witnesses who were examined to corroborate the evidence of the Investigating Officer in respect of the panchanama have not supported the prosecution case. P.W. 3 - Harishchandra Maruti Sawant was attached to Wagale Estate Police Station who was a P.S.I. at the relevant time. He has deposed that on 31/8/2002, at about 1.00 p.m., Shri Jadhav had received an information that the accused was to bring charas near Shrimata Beer Bar and Restaurant for the purpose of selling it in the open market. He has deposed that API Jadhav reduced that information into writing, the entry was made in the Station Diary and a report was submitted to Shri Tambat by Shri Jadhav. He has accompanied the raiding party and he has further deposed that Shri Tambat had asked the accused whether he intended to be searched before a Gazetted Officer or Magistrate and also informed him that he was a Gazetted Officer. P.W. 4 - Anant Sakharam Nirmal was the Police Constable for the relevant period and he had carried the sample to the Chemical Analyser with a covering letter. P.W. 5 - - Rajendra Jadhav was working as API, Crime Branch, Thane and was attached to Wagale Police Station at the relevant

time. He has also stated that Shri Tambat had inquired with the accused as to whether he wanted a search to be taken by the Magistrate or a Gazetted Officer. He had further told the accused that he himself was a Gazetted Officer. However, the accused declined to exercise his right. He has further stated that the muddemal was deposited in the Police Station and it was sent to the Chemical Analyser with a covering letter - Exhibit-15 on 2/9/2002. P.W. 6 - Janardan Thorat has stated that he received C.A. Certificate which was brought by the Police Constable Nirmal. Finally prosecution examined P.W. 7 - Rajendra Tambat. He has stated that he had disclosed to the accused that he was a Gazetted Officer and whether the accused wanted the search to be taken by other Gazetted Officer or Magistrate. However, the accused declined to accept the said offer. This witness has stated that the sample packet as well as bulk were sealed on the spot.

6. From the evidence of these witnesses, it can be seen that there was non-compliance of the provisions of sections 55 and 57. None of the witnesses has stated that after the seizure of the contraband, the provisions of section 55 or 57 were followed. As per the said provisions, a duty is cast on the officer in

charge of the Police Station to take charge and keep in safe custody all articles seized under the Act and a further duty is cast on the Officer in charge of the Police Station to affix a seal to such articles. Further, under section 57 of the Act, a duty is cast on the person who arrests or seizes the contraband to submit a report to his immediate superior officer within 48 hours after the arrest is taken place. There is clear non-compliance of the provisions of sections 55 and 57 of the N.D.P.S. Act. Apart from non-compliance of the aforesaid provisions, the prosecution has relied upon the testimony of Police Officers and no independent witness has been examined. Both the panch witnesses have turned hostile. There is no corroboration of independent witness to the said seizure and arrest of the accused. Under these circumstances, it is difficult to rely on the evidence of the Police Officers regarding the search and seizure particularly when this fact was not reported to the immediate superior after the search and seizure. Under these circumstances, it is difficult to rely on the evidence adduced by the prosecution and it will have to be held that the prosecution has not proved beyond the reasonable doubt that the accused had committed the said offence. The ratio of the judgments relied upon the learned Counsel appearing on

behalf of the accused, therefore, is clearly applicable to the facts of the present case. The Judgment and Order of the Trial Court, therefore, will have to be set aside. Accordingly the following order is passed:-

O R D E R

. Appeal is allowed. The accused is acquitted of the charge levelled against him. The Judgment and order of the trial court is set aside. The accused be released forthwith unless he is otherwise required in any other offence.

V.M.KANADE, J.